Item 9
Attachment 7
2/16/01

Summary of Significant Issues
In Tentative Order No. 2001-01

Number	Issue	Permit Section(s)	Permit Change	Rationale
1	The prohibition against increases in peak flow rates and velocities should not be applied to all development projects.	A.4, F.1.a.9, F.1.b.1.g	Y	The Tentative Order's requirement that "Post-development runoff which is greater in peak rate or velocity than pre-development runoff from the same site is prohibited" was designed to protect downstream areas from erosion caused by increased flows resulting from development. However, the blanket prohibition, as proposed, could result in the application of the requirement at relatively small sites, which pose an insignificant threat of downstream erosion due to their limited impervious surfaces. Application of the prohibition at all sites could also pose significant implementation difficulties for the Copermittees. For these reasons, the requirement that post-development peak flow rates not exceed predevelopment rates for all development sites has been removed. Instead, the requirement shall only apply to new development and significant redevelopment falling under the SUSMP priority development project categories. The SUSMP priority development project categories are comprehensive in their application to significant new development and redevelopment projects. The categories ensure that most new development and redevelopment will be subject to SUSMPs. Therefore, the requirement that post-development peak flow rates not exceed predevelopment rates will still apply to most development projects. Only smaller projects will be exempted.
2	The prohibition against discharges of post-development runoff into Clean Water Act section 303(d) water bodies containing any pollutant (for which the water body is already impaired) in levels exceeding predevelopment levels is inappropriate for a municipal storm water permit and should instead be resolved in the TMDL process.	A.4, F.1.a.9, F.1.b.1.g, F.1.b.2.b.xv	Y	The holding of post-development pollutant discharges to predevelopment or natural levels may not always be necessary for the protection of receiving water quality. There may be circumstances where a slight increase in pollutant concentrations from newly developed area may not contribute to an exceedance of water quality standards. For example, if a discharge's pollutant concentration from a newly developed area is increased but still well below the water quality objective for the 303(d) listed receiving water, the discharge will most likely not contribute to the exceedance of the water quality objective. The TMDL process frequently allows for such a situation, when "safety factors" for new development are included in waste load allocations. The TMDL process is a more appropriate process for determining such allocations that the Tentative Order. It is a formal process which allows for extensive stakeholder involvement and public participation. It also addresses discharges from all sources, both existing and new. For these reasons, the Tentative Order has been modified. The Tentative Order will still prohibit "post-development runoff containing pollutant loads which cause or contribute to an exceedance of receiving water quality objectives." Also, the potential for new development to cause or contribute to the 303(d) listing of a receiving water will need to be addressed in the Copermittees' planning processes. However, the requirement that post-development pollutant concentrations not exceed predevelopment pollutant concentrations will be removed. This issue will be addressed during the pending TMDL processes.
3	The Tentative Order's various requirements prohibiting discharges which cause or contribute to an exceedance of water quality standards go beyond the MEP standard and are	Multiple	N	The Tentative Order's inclusion of provisions requiring compliance with water quality standards is in line with the SWRCB Orders. The issue of whether storm water discharges from MS4s must meet water quality standards has been intensely debated for the past five years. The argument arises because Clean Water Act section 402(p) fails to clearly state that municipal dischargers of storm water must meet water quality standards. On the issue of industrial discharges of storm water, the statute clearly indicates that industrial dischargers must meet both (1) the

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	inconsistent with the Clean Water Act and California State Water Resources Control Board Order Nos. 98-01 and 99-05.			technology-based standard of "best available technology economically achievable (BAT)" and (2) applicable water quality standards. On the issue of municipal discharges however, the statute states that municipal dischargers must meet (1) the technology-based standard of "maximum extent practicable (MEP)" and (2) "such other provisions that the Administrator or the State determines appropriate for the control of such pollutants." The statute fails, however, to specifically state that municipal dischargers must meet water quality standards. As a result, the municipal storm water dischargers have argued that they do not have to meet water quality standards; and that they only are required to meet the MEP standard. Environmental interest groups maintain that not only do MS4 discharges have to meet water quality standards, but that MS4 permits must also comply with numeric effluent limitations for the purpose of meeting water quality standards. On the issue of water quality standards, the US EPA, the SWRCB, and the SDRWQCB have consistently maintained that MS4s must indeed comply with water quality standards. On the issue of whether water quality standards must be met by numeric effluent limits, the US EPA, the SWRCB (in Orders WQ 91-03 and WQ 91-04), and the SDRWQCB have maintained that MS4 permits can, at this time, contain narrative requirements for the implementation of BMPs in place of numeric effluent limits. SWRCB rationale: In addition to relying on US EPA's legal opinion concluding that MS4s must meet MEP and water quality standards, the SWRCB also relied on the Clean Water Act's explicit authority for States to require "such other provisions that the Administrator or the State determines appropriate for the control of such pollutants" in addition to the technology-based standard of MEP. To further support its conclusions that MS4 permit dischargers must meet water quality standards, the SWRCB relied on provisions of the California Water Code that specify that all waste discharge requirements must implement applicable Basin Plans and take into consideration the appropriate water quality objectives for the protection of beneficial uses. The SWRCB first formally concluded that permits for MS4s must contain effluent limitations based on water quality standards in its Order WQ 91-03. In that Order, the SWRCB also concluded that it was appropriate for Regional Boards to achieve this result by requiring best management practices, rather than by inserting numeric effluent limitations into MS4 permits. In Order WQ 98-01, the SWRCB prescribed specific precedent setting Receiving Water Limitations language to be included in all future MS4 permits. This language specifically requires that MS4 dischargers meet water quality standards and allows for the use of narrative BMPs (increasing in stringency and implemented in an iterative process) as the mechanism by which water quality standards can be met. In Order WQ 99-05, the SWRCB modified its receiving water limitations language found in Order WQ 98-01 to meet specific objections by the US EPA (the modifications resulted in stricter compliance with water quality standards). SWRCB Order WQ 99-05 states "In Order WQ 98-01, the State Water Resources Control Board (State Water Board) ordered that certain receiving water limitation language be included in future municipal storm water permits. Following inclusion of that language in permits issued by the San Francisco Bay and San Diego Regional Water Quality Control Boards (Regional Water Boards) for Vallejo and Riverside respectively, the United States Environmental Protection Agency (EPA) objected to the permits. The EPA objection was based on the receiving water limitation language. The EPA has now issued those permits itself and has included receiving water limitation language it deems appropriate.

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				"In light of EPA's objection to the receiving water limitation language in Order WQ 98-01 and its adoption of alternative language, the State Water Board is revising its instructions regarding receiving water limitation language for municipal storm water permits. It is hereby ordered that Order WQ 98-01 will be amended to remove the receiving water limitation language contained therein and to substitute the EPA language. Based on the reasons stated here, and as a precedent decision, the following receiving water limitation language [which is found in Receiving Water Limitations item C. of Order No. 2001-01] shall be included in future municipal storm water permits." In a late 1999 case involving MS4 permits issued by US EPA to several Arizona cities (Defenders of Wildlife v. Browner, 1999, 197 F. 3d 1035), the United States Court of Appeals for the Ninth Circuit upheld US EPA's requirement for MS4 dischargers to meet water quality standards, but it did so on the basis of US EPA's discretion rather than on the basis of strict compliance with the Clean Water Act. In other words, while holding that the Clean Water Act does not require all MS4 discharges to comply strictly with state water quality standards, the Court also held that US EPA has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants. On the question of whether MS4 permits must contain numeric effluent limitations, the court upheld US EPA's use of iterative BMPs in place of numeric effluent limits. SWRCB's final position: On October 14, 1999, the SWRCB issued a legal opinion on the federal appellate decision and provided advice to the Regional Boards on how to proceed in the future. In the memorandum, the SWRCB concludes that the recent Ninth Circuit opinion upholds the discretion of US EPA and the State to (continue to) issue permits to MS4s that require compliance with water quality standards through iterative BMPs. Moreover, the memorandum states that "[…] because most MS4 discharges enter impaired water bodies, there is a real need for permits to include stringent requirements to protect those water bodies. As total maximum daily loads (TMDLs) are developed, it is likely that MS4s will have to participate in pollutant load reductions, and the MS4 permits are the most effective vehicles for those reductions." In summary, the SWRCB concludes that the Regional Boards should continue to include the Receiving Water Limitations language established in SWRCB Order WQ 99-05 in all future permits. Accordingly, the SDRWQCB has required in the Tentative Order that discharges from MS4s meet receiving water quality objectives.
4	A regional approach to BMP implementation should be allowed by the permit, as opposed to the permit's site-by-site focus. Due to economies of scale, regional approaches are more cost effective. Regional BMPs can enhance wetland and riparian habitats.	F.1.b.2.c	Y	Implementation of BMPs on a site by site basis provides many benefits. By its very definition, new development presents opportunities for on-site BMPs to be designed into the development as an integral component, at low cost, and with a greater likelihood for protecting water quality downstream over the life of the development. Treatment costs for municipal storm water generally increase with distance from the source. Regional "end of pipe" treatment also results in the loss of cost reducing opportunities for water quality improvements en route. Rather than increasing costs, small collection strategies, located at the point where runoff initially meets the ground, repeated consistently over entire projects, will usually yield the greatest water quality improvements for the least cost (BASMAA, 1999). Furthermore, regional BMP approaches (such as end of pipe diversions) can send the wrong message to dischargers and the public, which can then cause setbacks in progress which has already been made. Instead of the idea that "business as usual" is acceptable since regional BMPs will "take care of everything" downstream, the message that SUSMPs and numeric sizing criteria should send is that behavior and site design must change in order for water quality to improve.

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				Additionally, popular short-term regional solutions, such as end of pipe diversions into sanitary sewers, are effective only for dry weather flows. The sanitary sewerage collection systems found in the San Diego region were not designed to handle the increased loads from dry weather flows, let alone flows from even minor storm runoff events. Likewise, the existing coastal Publicly Owned Treatment Works (POTWs) are not sized to treat wet weather flows, have almost no capacity for expansion, and will not be able to treat storm water flows. However, while onsite BMPs provide many benefits, there may be cases where offsite structural BMPs, implemented on a "neighborhood" or "sub-watershed" basis, may be more feasible. This is particularly the case for existing development, where opportunities for innovative site design do not exist. To allow more flexibility in BMP implementation, the Tentative Order SUSMP requirements regarding structural treatment BMPs will be changed to allow BMPs to be shared by multiple new development projects on a "neighborhood" or "sub-watershed" level. The SWRCB supports this approach in Order WQ 2000-11, which states "We do note that there could be further cost savings for developers if the permittees develop a regional solution to the problem." It should be noted, however, that shared BMPs will be required to be implemented upstream from any receiving waters supporting beneficial uses. The receiving waters (such as urban streams) of the region cannot be used to transport potentially contaminated urban runoff to "regional" treatment facilities.
5	The SDRWQCB should not require the Copermittees to address urban runoff flows "into" their MS4s because it does not have the appropriate legal authority. SDRWQCB does not have legal authority to apply performance standards (MEP or water quality standards) to individual project sites in Copermittee jurisdictions. Such requirements go beyond the requirements of the Clean Water Act.	Multiple	N	The requirement for control of discharges into the MS4 is currently required of the Copermittees in Order No. 90-42. Section IX. of Order No. 90-42 states "The permittees shall develop and implement BMPs to reduce/control/eliminate pollutants in discharges to and from stormwater conveyance systems in their areas of jurisdiction to the maximum extent practicable." Given the impact to receiving waters in the San Diego Region caused by urban runoff, as well as projections for increased urban growth in the region, it is not warranted to eliminate this requirement. USEPA supports the concept that Copermittees cannot passively receive and discharge pollutants from third parties. As US EPA states, "The operator of a small MS4 that does not prohibit and/or control discharges into its system essentially accepts 'title' for those discharges. At a minimum, by providing free and open access to the MS4s that convey discharges to the waters of the United States, the municipal storm sewer system enables water quality impairment by third parties" (USEPA, 1999b). Discharges of pollutants to the MS4 must therefore be controlled, and an important means for a municipality to achieve this is through the development and enforcement of municipal legal authority. USEPA states "A crucial requirement of the NPDES storm water regulation is that a municipality must demonstrate that it has adequate legal authority to control the contribution of pollutants in storm water discharged to its MS4. […] In order to have an effective municipal storm water management program, a municipality must have adequate legal authority to control the contribution of pollutants to the MS4. […] 'Control,' in this context, means not only to require disclosure of information, but also to limit, discourage, or terminate a storm water discharge to the MS4" (USEPA, 1992). Since discharges which enter the MS4 are generally discharged unimpeded directly into receiving waters, the Copermittee's legal authority is to apply to both discharges into and from MS4s. Federal NPDES regulations clearly provide the SDRWQCB with the legal authority to require municipalities to control discharges from third parties into their MS4. 40 CFR 122.26(d)(2)(iv)(A - D) require municipalities to implement controls to reduce pollutants in urban runoff from commercial, residential, industrial, and construction land uses or activities. Federal

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				NPDES regulations 40 CFR 122.26(d)(2)(i)(A - D) also require municipalities to have legal authority to control various discharges to their MS4. This concept is further supported in the Preamble to the Phase II Final Rule NPDES storm water regulations, which states "The operators of regulated small MS4s cannot passively receive and discharge pollutants from third parties" (USEPA, 1999b). Due to the greater water quality concerns generally experienced by larger municipalities, Phase II Final Rule findings for small municipalities are also applicable to larger municipalities such as the Copermittees. Finally, underlying the Federal NPDES storm water regulations is the Clean Water Act, which states in section 402(p)(3)(B)(ii) that municipalities shall "effectively prohibit non-stormwater discharges into the storm sewers." It is important to note the SWRCB also supports control of discharges into MS4s. The SWRCB recently upheld the LARWQCB SUSMP requirements in Order WQ 2000-11. These requirements place significant restrictions on discharges from third parties into MS4s. In fact, the SUSMP provisions included in the Tentative Order, as upheld by the SWRCB, represent the most stringent and specific requirements in the Tentative Order regarding the control of discharges into the MS4. Finally, the requirement for municipal storm water dischargers to have, and exercise, local governmental authority in order to comply with water quality control obligations is analogous to the requirement for Publicly Owned Treatment Works to have and exercise legal authority to require pretreatment of industrial wastes being discharged to their sewage collections systems (CWA 402(b)(8)).
6	The Tentative Order's various requirements for implementation of structural BMPs and infiltration may adversely impact wetlands by reducing flows reaching the wetlands.	Multiple	Y	Correctly implemented, the Tentative Order will not adversely impact wetlands through a reduction in their receipt of flows. There are two conditions to consider regarding flows to wetlands: wet weather flows and dry weather flows. The Tentative Order has been revised to include only one requirement (F.1.b.2.b.i.) regarding wet weather flows. It is important to note this requirement only applies to new development and significant redevelopment, and therefore does not effect the majority of the area of most watersheds. The requirement states: "BMPs shall […] Control the post-development peak storm water runoff discharge rates and velocities as necessary to maintain or reduce pre-development downstream erosion, and to protect stream habitat." As can be seen, the requirement attempts to maintain peak flow rates at predevelopment levels. Nowhere does the requirement make it necessary for peak flow rates to be reduced below predevelopment rates. By seeking to maintain predevelopment peak flow rates, the Tentative Order helps preserve the natural wet-weather runoff conditions, thereby protecting wetlands, as opposed to adversely impacting them. Irregardless, the Tentative Order has been modified to allow for the Copermittees to develop criteria to protect against downstream erosion and protect stream habitat (at section F.1.b.2.j). The Copermittees can design this criteria to alleviate any potential unforeseen impacts. The Tentative Order's SUSMP requirements include the option of infiltration of storm water. This in an option, and need not be used if concerns exist regarding unforeseen impacts. The Tentative Order also promotes infiltration of storm water runoff during wet weather. Again, these requirements seek to maintain the natural infiltration rates and thereby maintain the natural flow regime, which can only benefit wetlands. Development, with its associated impervious surfaces, greatly reduces infiltration at newly developed sites. Maximization of infiltration at such development sites will only swing infiltration rates back closer to their natural predevelopment levels. It is doubtful that natural predevelopment infiltration levels can even be achieved at developed sites, as many engineers attested to at the Tentative Order workshops. Therefore, it is highly unlikely that requirements promoting the use of infiltration will result in decreased surface flows to wetlands, thereby causing any adverse

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				impacts. On the contrary, promotion of infiltration maintains natural groundwater recharge and overland runoff rates, both of which are necessary for most healthy wetlands. Any argument focusing only on quantity of overland flows misses the important impact groundwater recharge typically has on wetlands. The other flow condition the Tentative Order addresses is dry weather flows. It has been stated that the Tentative Order's prohibitions on illicit discharges (section B) will impact the artificial dry weather flows upon which some wetlands are reliant. This is incorrect. The requirements for the prohibition of non-storm water discharges in section B of the Tentative Order are almost identical to requirements regarding non-storm water discharges in the current San Diego Municipal Storm Water Permit (Order No. 90-42). Clearly, these prohibitions have not led to the halt of dry weather urban runoff within San Diego County over the last ten years. It has been further stated that Legal Authority section D.1.b of the Tentative Order will also result in decreased dry weather flows to wetlands. Again, this is not the case. This section requires the Copermittees to have legal authority to prohibit the discharges described in the section. It does not require the discharges to be prohibited in all instances, but rather requires the Copermittees to have the legal authority to prohibit such discharges in the event that prohibition is determined to be necessary. Irregardless, it is doubtful that any of the discharges discussed in section D.1.b would be beneficial to wetlands due to their typical pollutant content. It has also been suggested that the provisions of the Tentative Order will require the diversion of dry weather flows to the sanitary sewer, thereby depriving wetlands of valuable artificial flows. Nowhere does the Tentative Order require diversion of any types of flow to the sanitary sewer. The Tentative Order actually does the opposite by promoting onsite controls and discouraging diversion. The draft Fact Sheet/Technical Report also discusses a preference for on site controls as opposed to diversion-type regional solutions. Furthermore, the Tentative Order's requirement that dry weather flows be diverted from structural infiltration BMPs (section F.1.b.2.i.iii) does not constitute a diversion to the sanitary sewer. Dry weather flows can simply be diverted to other BMPs such as filters, which would remove pollutants in the dry weather flows prior to their discharge to wetlands or other downstream areas.
7	The 24-hour 80th percentile storm event, as proposed by APWA, should be the basis for numeric sizing criteria. Treatment of the 24-hour 80th percentile storm event is considered to meet the MEP standard for semi-arid regions, as noted by Urban Runoff Quality Management, WEF Manual of Practice No. 23/ASCE Manual and Report on Engineering Practice No. 87.	F.1.b.2.c	N*	* The APWA proposal for determination of the amount of runoff to be treated under SUSMPs raises two issues: (1) The SUSMPs requirement for the treatment of the 85th percentile storm event should be reduced to the 80th percentile storm event; and (2) hourly rainfall data from Lindbergh Field should be applied to precipitation contour maps to determine the size of the storm which must be treated. (1) First of all, reducing the requirement for the treatment of the 85th percentile storm event to the 80th percentile storm event is inappropriate for the San Diego Region. The sole reasoning provided by APWA for reducing the size of the design storm which must be captured is that the City of Denver has chosen to capture the 80th percentile storm event. It is doubtful that the City of Denver has a more than $1.2 billion tourism economy as closely tied to water quality as that of the San Diego Region (a SANDAG memo states that projections by the California Department of Boating and Waterways find nearly $1.2 billion in direct revenue and $1.2 billion in indirect revenue is pumped into the San Diego area economy each year by out-of-state visitors) (SANDAG, 1996). Capture of the 80th percentile storm event is equivalent to capture of runoff form approximately 0.4 inch of rainfall in the City of San Diego, as calculated by APWA. This is a smaller amount of rainfall than must be treated in Austin, Virginia, Delaware, Maryland, New Jersey, Chicago, New Jersey, Florida, and the Puget Sound Basin. More importantly, the 80th percentile storm event is less than what has been determined to constitute MEP by the SWRCB in Order WQ 2000-11. The SWRCB states "The Order finds that the design standard in the SUSMPs,

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				which essentially requires that 85 percent of the runoff from specified categories of development be infiltrated or treated, reflects MEP" (SWRCB, 2000b). While Denver may arguably have a climate which is somewhat similar to San Diego's, certainly criteria developed by the SWRCB for the Los Angeles region are more applicable to San Diego than criteria used by Denver, Colorado. In addition, capture of the 80th percentile storm event ignores the concept of diminishing returns. The 85th percentile storm event is representative of the point of diminishing returns for the San Diego Region. The 85th percentile storm event represents the BMP capacity beyond which, insignificant increases in runoff capture will occur, relative to additional costs. Even a cursory look at APWA's graphed data (Exhibit A of their proposal, which is item B of Attachment 13 of the Executive Officer Summary Report for the December 13, 2000 Public Hearing) shows that capture of a 0.4 inch storm is well below the "knee of the curve," or the point of diminishing returns. (2) The APWA proposal also recommends a different method for calculation of the design storm event from that proposed in the Tentative Order. Where the Tentative Order proposes use of 24-hour rainfall data from several locations, the APWA proposal uses hourly rainfall from one location (Lindbergh Field). The Tentative Order proposes that each Copermittee use 24-hour rainfall data from its area to calculate its design size storm. While use of 24-hour rainfall data is not as rigorous as use of hourly rainfall data, 24-hour data is typically much more available, thereby allowing Copermittees to use local data to calculate the design storm to be used in their jurisdictions. In fact, a lengthy record of hourly rainfall data is only available in one place within San Diego County: Lindbergh Field. The APWA proposal uses this hourly rainfall data from Lindbergh Field and applies it to the entire county through the use of precipitation contour (isopluvial) maps. While there may be potential inaccuracies in applying data from one site to the entire county, use of such precipitation contour maps is common practice. In light of the increased rigorousness of using hourly data, as well as the common practice of using precipitation contour maps, the Tentative Order has been modified to allow for the 85th percentile storm event to be calculated by applying hourly rainfall data from Lindbergh Field to precipitation contour maps.
8	The Order cannot be adopted without required CEQA review.	NA	N	Discharges of urban runoff in municipal separate storm sewer systems (MS4s) involve discharges of pollutants from point sources to waters of the United States that are subject to regulation under federal Clean Water Act (CWA) and Chapter 5.5 of Porter Cologne Water Quality Control Act (PC). Chapter 5.5 of PC commencing with section 13370 provides additional water quality control authority specifically applicable to such discharges in order to ensure the consistency of California's state program for water quality with the federal NPDES programs as set forth in Water Code (WC) 13372. Water Code 13389 relieves the RWQCB of its obligation to prepare environmental impact documentation under the California Environmental Quality Act (CEQA) prior to issuing waste discharge requirements (WDRs) for discharges subject to regulation under Chapter 5.5, such as waste discharge requirements for MS4s. Issuance of requirements for discharges of urban runoff in MS4s is required by Section 402 (d) of the CWA. The fact that some of the specific requirements of a regional board order may exceed the nationwide minimum standards for MS4 regulation prescribed by the CWA and NPDES regulations in 40CFR 122.26 does not abrogate this exception. The "project" in this case is issuance of requirements for discharges in MS4s, an action required by the CWA and NPDES regulations. The comment contends that WC 13389 is not applicable to MS4s because the requirements will be applicable to sources that will be constructed in the future. This interpretation of the meaning

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				of "new source" under the CWA misrepresents the definition of that term. The criterion for a "New Source" includes the promulgation of "national standards of performance" under CWA Section 307 (i.e. technology-based effluent limits for industrial source categories). MS4s are not within any of the promulgated industrial source categories and the USEPA has not promulgated national standards of performance for MS4s. Therefore, MS4s cannot be New Source at this time, regardless of when constructed. Parties have contended that many provisions in Tentative Order 2001-01 are not required by the CWA or federal NPDES regulations; however, all provisions are intended to implement or clarify specific requirements in applicable federal regulations to protect water quality of waters of the United States within the San Diego Region. In fact, all regulatory actions taken by the state to satisfy the requirements of the CWA rely on the state's independent authority to regulate activities affecting water quality. U.S. EPA authorization for California to implement the NPDES program depends upon the state's demonstration of independent authority to accomplish under state law what would be required under the federal CWA and NPDES regulations; Chapter 5.5 of PC ensures consistency between state and federal regulations for discharges subject to the CWA. Accordingly, WC 13389 provides exemption from environmental documentation under CEQA for any action that would be required for implementation of NPDES programs in California. Issuance of WDRs for MS4 is required for implementation of the CWA and NPDES program in California. There are no alternatives to regulation of discharges in MS4 under WDRs implementing Basin Plan and NPDES regulations for storm water.
9	The RWQCB does not possess the authority to assign site priorities (high, medium, or low) for Copermittees.	Multiple	N	The SDRWQCB has the authority to assign site priorities for oversight by the Copermittees. The Federal NPDES regulations clearly place an emphasis on the prioritization of sites of various land uses. Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(3) provides that the proposed management program include "A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality." Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(5) provides that the proposed management program include "A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges." Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(C)(1) provides that the Copermittee must "identify priorities and procedures for inspections and establishing and implementing control measures for such discharges." The Tentative Order's requirements regarding site prioritization are more detailed than those in the Federal NPDES regulations. The SDRWQCB has increased the detail of the site prioritization requirements under Clean Water Act section 402(p)(3)(b)(iii), which states that a storm water program "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." This increased detail is necessary due to the continued degradation of the region's receiving waters caused by urban runoff. The "1998-1999 City of San Diego and Co-Permittee NPDES Stormwater Monitoring Program Report" indicates that the typical urban runoff coming from residential, commercial, industrial, and roadway land uses frequently contains such pollutants as Total Phosphorus, Nitrate + Nitrite Nitrogen, Total Suspended Solids, Lead, Copper, and Zinc at concentrations which exceed USEPA benchmark values for storm water (City of San

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				Diego, 1999). Construction sites are also a significant concern due to the impairment caused by sediment of such valuable water resources within the region as Agua Hedionda Lagoon, Buena Vista Lagoon, San Elijo Lagoon, and Los Penasquitos Lagoon. Increased detail in the prioritization of sites is further supported by USEPA's "Interim Permitting Approach" which supports expansion of permit requirements where necessary to attain water quality standards (USEPA, 1996). Finally, the SWRCB upheld in Order WQ 2000-11 prioritization of sites by a Regional Board in the LARWQCB SUSMP. The LARWQCB SUSMP identified various priority development project categories which are high priority. The SWRCB found that identification of high priority sites was appropriate.
10	The SDRWQCB does not have legal authority to require pollution prevention BMPs on all sites. The Copermittees should be allowed to determine where pollution prevention BMPs are needed.	Multiple	Y	Under the CWA, the Copermittees are required to reduce pollutants in urban runoff discharges to the maximum extent practicable. Pollution prevention is considered by the SDRWQCB to be an important part of meeting the MEP standard. Pollution prevention BMPs are generally more cost effective than removal of pollutants by treatment facilities or cleanup of contaminated media. In the Pollution Prevention Act of 1990, Congress established a national policy that emphasizes pollution prevention over control and treatment. However, in order to provide the Copermittees discretion in implementing their urban runoff management programs, pollution prevention will only be required where the Copermittees deem it appropriate. By not specifying its use in any particular instance, and not specifying types of pollution prevention to be used, the requirement for pollution prevention does not violate the CWC and CWA.
11	It is incorrect for Finding No. 5 to state that "urban streams are part of the municipalities MS4." Only urban streams owned by, or under the control of, Copermittees are part of the MS4.	Finding 5	N	A municipality's responsibility for discharges of storm water and urban runoff in its MS4 must be coextensive with the municipality's jurisdiction to regulate such discharges. Discharges of storm water that are not within a municipality's jurisdiction or that are not tributary to a municipality's MS4 may be subject to other water quality control requirements, but may not impose upon the municipality any regulatory obligation under these requirements. However, the commenter is incorrect to assert that a municipality should not be responsible under the requirements for discharges to natural drainages that are used as part of the municipality's MS4, regardless of the "ownership" of such a natural drainage or stream. The determination of whether or not a particular natural drainage or urban stream channel is or is not part of the municipality's MS4 depends on the particular circumstances of the channel and the municipality's urban runoff management practices. If municipalities rely on natural drainage channels or urban streams to collect and convey urban runoff and storm water to or from an MS4, they should be recognized as components of the municipality's MS4; the municipality would be required to reduce pollutant discharges therein to the maximum extent practicable. Application of requirements for discharges of storm water in MS4s to natural drainages and urban streams does not "transform" such drainages and streams to MS4s; however, it does reflect the fact that the Regional Board recognizes the water quality consequences of municipalities' reliance on such drainages and streams for the management of storm water and urban runoff, and the environmental impact upon such drainages and streams as a consequence of the increased flows therein associated with urban development and land use under the planning and regulatory authority of municipalities.
12	Municipalities in many cases do not have the legal ability to control certain discharges, including those from agriculture, state and federal institutions, native lands, foreign countries, and the atmosphere. The Tentative Order does not address this	Multiple	N	State and Federal lands and activities will be addressed under the Phase II Storm Water NPDES Regulations in March 2003. The operators of these facilities will be added as Copermittees or otherwise be required to meet or exceed the requirements of the Jurisdictional Urban Runoff Management Program for the area in which they are located. The Tentative Order does not require the Copermittees to control runoff from freeways, agricultural land, etc. over which they do not have jurisdiction, provided that discharges from such sources do not enter their MS4s. Municipalities cannot arrogate to themselves the authority to regulate discharges from facilities or activities beyond their jurisdiction, e.g., discharges from state and federal facilities including highways and Indian

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	limitation and instead mandates control of these discharges.			reservations directly to waters of the state that are not part or tributary to the municipality's MS4. Municipalities are required, however, to have or develop legal authority to regulate storm water discharges and urban runoff within their jurisdictions, including discharges that may be subject to concurrent regulation by the state and federal governments. In addition, where municipalities control access to MS4 infrastructure for the accommodation of discharges from entities within their physical jurisdiction (including school districts, state and federal facilities, construction sites and industrial facilities) municipalities must exercise such control in a manner consistent with their obligation under the Regional Board's requirements to reduce pollutants in their MS4 to the maximum extent practicable. The SDRWQCB recognizes that municipalities may not have jurisdiction over all discharges and sources of pollutants discharged to MS4, e.g., state and federal facilities, other municipalities, etc., however, federal NPDES regulations require municipalities to have or develop legal authority (and sources of funding) to control discharges of pollutants to MS4. Where municipalities lack regulatory jurisdiction, they nonetheless control the infrastructure of the MS4 and can impose water quality conditions upon those who would discharge storm water or urban runoff to the MS4. Discharges associated with agriculture, and other non-point sources of pollution, can be regulated more readily to regulation through local authority than under individual waste discharge requirements. Pollution prevention and control measures implemented under local land use authority will assist municipalities in reducing pollutants in MS4 under the requirements issued by the regional board.
13	The “tributary to” language in the Order must be clearly and appropriately defined, and consistently applied. This language and the additional prescriptive requirements associated with it should be abandoned since they violate CWC section 13360. Copermittees should instead be given the flexibility to impose additional requirements on stormwater dischargers where the Copermittee determine that this is necessary.	Multiple	Y	The intent of the Tentative Order in designating sites tributary to Clean Water Act section 303(d) water bodies as high priority, thereby requiring additional oversight and BMP implementation, was to protect those water bodies from further degradation. The purpose was not to have all sites tributary to such water bodies identified as high priority, but rather to have those sites with the potential to adversely affect the water bodies identified as high priority. For example, the intent was to have construction sites (sources of sediment) identified as high priority if they were tributary to a 303(d) water body impaired for sediment. In such cases, tributary is still broadly defined to include any sites which eventually drain to the 303(d) water body. However, the sites which are identified as high priority have been limited to those which have the potential to generate pollutants for which the 303(d) water body is impaired. The Tentative Order has been changed to clarify this intent. Regarding the Tentative Order’s designating sites tributary to environmentally sensitive areas as high priorities, thereby requiring additional oversight and BMP implementation, the intent was to provide environmentally sensitive areas an additional layer of protection. The purpose was not to have all sites tributary to such bodies identified as high priorities, but rather to ensure that sites which have the potential to directly impact environmentally sensitive areas be identified as high priorities. For example, sites within or directly adjacent to or discharging directly to environmentally sensitive areas have relatively high potential to impact receiving waters in environmentally sensitive areas due to their proximity to the areas, and should be identified as high priorities. Therefore, the Tentative Order language referring to discharges tributary to environmentally sensitive areas has been changed; instead, only sites which are within or directly adjacent to or discharging directly to environmentally sensitive areas need to be considered high priorities. This will provide environmentally sensitive areas an additional layer of protection while reducing the number of sites designated as high priorities.
14	The Tentative Order and supporting Fact Sheet/Technical Report has not	NA	N	Regional board has considered the costs associated with implementation of requirements for discharges to MS4 as well as the costs incurred as a result of pollution associated with discharges from MS4; while there will be,

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	considered the potential costs of implementing the permit, either to the Copermittees or to the parties they regulate, and no cost/benefit analysis or evaluation of economic considerations has been conducted as required by CWA and Porter-Cologne and U.S. EPA's final Phase II rule.			undoubtedly, incremental costs to municipalities to implement requirements for MS4, the increased burden associated with the tentative requirements is not unreasonable in view of the following factors: municipalities can pass costs for planning and permitting on to permit applicants; municipalities can impose fees on persons who use MS4 infrastructure or require services from the municipality; municipalities can incorporate pollution prevention and control planning into existing planning activities; and municipalities can incorporate pollution and control implementation into existing regulatory functions. The regional board is not required to undertake a formal Cost/Benefit Analysis, or other comprehensive economic analysis for the issuance of waste discharge requirements. While regional boards are required to consider economic factors in the development of basin plans (W.C. 13241), regional boards are not specifically required to undertake Cost/Benefit Analysis. Neither do federal regulations compel reliance on any particular form of economic analysis in the implementation of requirements based on the MEP performance standard; the admonition quoted from 64 Fed. Reg. 68722 & 68732 calls for flexible interpretation of MEP based on site-specific characteristics and "cost considerations as well as water quality effects…." Thus, while the regional board is advised to consider costs as a factor in determining the reasonableness or practicability of requirements, there is no state or federal mandate for a more formal economic analysis involving the development of Cost/Benefit or Cost-Effectiveness relationships.
15	The Tentative Order should not require the Copermittees to enforce the statewide General Construction and Industrial Permits.	Multiple	Y*	*The Copermittees are not responsible for enforcing or overseeing the General Statewide Industrial or Construction Permits. The SDRWQCB will oversee and enforce the General Statewide Industrial and Construction Permits. The Copermittees are however, responsible for enforcing their ordinances that implement the Tentative Order, including the prohibitions against illicit discharges. In some cases, the Copermittees may be required to implement or require the implementation of BMPs at construction or industrial sites that exceed the minimum requirements of the General Statewide Industrial or Construction Permits in order to achieve compliance with the requirements of the Tentative Order. USEPA supports this approach, clearly placing responsibility for the control of discharges from construction and industrial sites with municipalities. The USEPA notes in the preamble to the Storm Water Regulations that municipalities are in the best place to enforce compliance with storm water discharge requirements: "Because storm water from industrial facilities may be a major contributor of pollutants to MS4s, municipalities are obligated to develop controls for storm water discharges associated with industrial activity through their system in their storm water management program…The CWA provides that permits for municipal separate storm sewers shall require municipalities to reduce pollutants to the maximum extent practicable. Permits issued to municipalities for discharges from municipal separate storm sewers will reflect terms, specified controls, and programs that achieve that goal." As noted in the Fact Sheet/Technical Report, the USEPA felt it so important to control the discharge of pollutants from construction and industry that it established a double system of regulation over construction and industrial sites. Two parallel regulatory systems were established with the same common objective of keeping pollutants from construction and industrial sites out of the MS4. A structure was created where local governments must enforce their local ordinances and permits as required under their municipal storm water permits, while the SDRWQCB (state) must enforce its statewide general construction and industrial storm water permits. The two regulatory systems were designed to complement and support each other in the shared goal of minimizing pollutant discharges in runoff from construction and industrial sites.

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				Local governments have regulatory authority over the majority of construction and industrial sites since they issue the development and land use permits for the sites. In other words, the Copermittees are responsible for the water quality consequences of their planning, construction, and land use decisions. Regarding construction sites, USEPA also places enforcement responsibility on municipalities, requiring small municipalities to develop and implement "[a]n ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance […]" (40 CFR 122.34(b)(4)(ii)(A)) (emphasis added). In its guidance for the Phase II regulations, US EPA goes on to support increased municipality responsibility, stating "Even though all construction sites that disturb more than one acre are covered nationally by an NPDES storm water permit, the construction site runoff control minimum measure for the small MS4 program is needed to induce more localized site regulation and enforcement efforts, and to enable operators of regulated small MS4s to more effectively control construction site discharges into their MS4s." While these above citations refer to small municipalities under Phase II of the NPDES program, USEPA recommendations to small municipalities are applicable to larger municipalities such as the Copermittees, due to the typically more serious water quality concerns attributed to such larger municipalities. The language of the Tentative Order has been revised to more carefully describe the requirements of the Tentative Order with regard to the dual regulation of construction and industrial sites as discussed above. With the recent addition of resources and staff from budget augmentations in several programs, including storm water, the SDRWQCB expects to "vigorously administer and enforce" the General Statewide Industrial and Construction permits as requested by one commentor. The language of Finding 24 of the Tentative Order has been revised to remove all discussion of what constitutes "good faith" in enforcing local legal authority.
16	It is contrary to state law, and the SDRWQCB lacks the legal authority, for the Tentative Order to specify what the Copermittees must include in their General Plan.	F.1.a	Y	The Tentative Order has been changed to allow the Copermittees discretion in determining the contents of their General Plans with regards to urban runoff.
17	All fire activities should be exempt from the storm water permit.	B.4	Y	The SDRWQCB agrees that all fire service activities are important to the protection of life and property. It is possible that extensive BMP implementation could potentially impair fire service readiness in some cases. For these reasons, section B.4 of the Tentative Order has been changed. In order to allow the discharge of non-emergency fire fighting flows to be addressed in a manner which is feasible for the fire service, section B.4 will require the Copermittees to develop and implement a program to reduce pollutants in non-fire fighting flows identified by the Copermittees to be significant sources of pollutants. This will provide the Copermittees and the fire service with the means to develop a program which will not adversely affect fire service activities or require diversion of wash water, etc to the sanitary sewer.
18	The Analytical Dry Weather Monitoring Program as written will be too expensive for the Copermittees to implement.	Attachment E	Y	The Dry Weather Monitoring Program has been revised to lower costs and provide greater discretion on the part of the Copermittees to design and implement it.
19	The implementation schedule is unachievable.	Multiple	Y	The Tentative Order has been revised to extend the implementation schedule for several tasks and submittals to provide the Copermittees with the time needed to implement the requirements, most of which have been required under Order 90-42. The deadlines for the requirements of Section D.2 have been extended from 90 days to 180 days. The implementation schedule deadline for the Jurisdiction Urban Runoff Management Program, excluding Section F.1, has been extended in the revised Tentative Order from 180 days to 365 days.

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20	Several permit requirements constitute an unfunded mandate requiring reimbursement from the State.	Multiple	N	The requirements of the tentative permit are not within the definition of "unfunded mandate" that would require reimbursement of costs under the California Constitution. This is because the requirements of the tentative permit are derived from the federal Clean Water Act, as opposed to State Law. Since the tentative order would implement a federal requirement, rather than a state requirement, the tentative order is not an "unfunded mandate" by the state. The State Water Resources Control Board (SWRCB) has previously determined in several circumstances that regional board orders are exempt from the requirement for reimbursement under the California Constitution. Also, although this program is a federal requirement, SDRWQCB staff has provided the Copermittees with information on creating funding sources. Several Copermittees have established funding sources to mitigate the strain on the municipalities general fund.
21	The Tentative Order is too specific in its requirements, such as its designation of high priority sites. These requirements may not be cost effective to implement. The Regional Board proposal, due to its specificity, is in violation of CWC Section 13360.	Multiple	N	The requirements in the Tentative Order are based on the Federal NPDES regulations and USEPA and SWRCB guidance. Where the Tentative Order is more specific than the Federal NPDES regulations, it is based on USEPA and SWRCB guidance. The SDRWQCB has authority to include more specific requirements than the Federal regulations under CWA section 402(p)(3)(B)(iii) and CWC section 13377. USEPA supports the approach of increasingly detailed storm water permits, stating "The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards" (USEPA, 1996). The Tentative Order is not in violation of CWC section 13360. CWA section 402(p)(3)(B)(iii) provides that municipal storm water permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." To meet this requirement of the CWA, the tentative permit requires the implementation of BMPs, as required under Federal NPDES regulation 40 CFR 122.44(k). While the tentative permit includes requirements for widespread BMP implementation, it does not require use of any particular BMPs. The tentative permit actually encourages implementation of combinations of BMPs, and further does not preclude any particular BMPs or other means of compliance. A permit which allows for seemingly infinite means for achieving compliance does not 'specify the design or manner of compliance' in violation of California Water Code section 13360. The specified programs included in the tentative permit must be implemented by the Copermittees in order to carry out the CWA requirements. Any specified programs in the tentative permit are made all the more necessary by the exclusion of numerical effluent limits from the permit. Reliance on BMPs as opposed to numerical effluent limits requires specification of those programs that are relied upon to reduce pollution. Finally, the SWRCB's recent tentative decision on the appeal of the Los Angeles Regional Water Quality Control Board's (LARWQCB's) action on SUSMPs and numeric sizing criteria appears to support inclusion of detail in municipal storm water permits on the level which is found in the tentative permit. The SWRCB tentatively found that the numeric sizing criteria requirement for post-construction BMPs did not violate California Water Code section 13360. Provided that the numeric sizing criteria requirement is most likely the most specific requirement in the tentative permit, the SWRCB tentative decision in support of numeric sizing criteria indicates its general approval of the level of detail found in the tentative permit.

References

See draft Response to Comments document for references.

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